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BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL
CHAIRMAN
JIM IRVIN
COMMISSIONER
MARC SPITZER
COMMISSIONER

Arizona Corporation Commission
DOCKETED

AUG 23 2002

DOCKETED BY

DOCKET NO. T-04014A-01-0340

DECISION NO. 65125

OPINION AND ORDER

IN THE MATTER OF THE APPLICATION OF
KMC DATA, L.L.C. FOR A CERTIFICATE OF
CONVENIENCE AND NECESSITY TO PROVIDE
FACILITIES-BASED AND RESOLD LOCAL
EXCHANGE ACCESS, AND RESOLD
INTEREXCHANGE TELECOMMUNICATIONS
SERVICE IN ARIZONA AND FOR
COMPETITIVE CLASSIFICATION OF ITS
SERVICES.

DATE OF HEARING: July 17, 2002
PLACE OF HEARING: Phoenix, Arizona
ADMINISTRATIVE LAW JUDGE: Philip J. Dion III
APPEARANCES: Mike Patten, ROSHKA HEYMAN & DEWULF, PLC,
on behalf of KMC Data, L.L.C.
Maureen A. Scott, Staff Attorney, Legal Division, on
behalf of the Utilities Division of the Arizona
Corporation Commission.

BY THE COMMISSION:

Having considered the entire record herein and being fully advised in the premises, the
Arizona Corporation Commission ("Commission") finds, concludes, and orders that:

FINDINGS OF FACT

1. On April 16, 2001, KMC Data, L.L.C. ("KMC" or "Applicant") filed with the
Commission an application for a Certificate of Convenience and Necessity ("Certificate") to provide
competitive facilities-based and resold local exchange, and resold interexchange telecommunications
services statewide.
2. On October 30, 2001, Applicant docketed a Notice of Filing of Affidavits of
Publication that comply with Commission rules.
3. KMC Telecom Holdings, Inc. is a Delaware "C" corporation, authorized to do

1 business in Arizona. KMC is a wholly owned subsidiary of KMC Data Holdco, L.L.C. KMC Data
2 Holdco, L.L.C is wholly owned by KMC Telecom Holdings, Inc. Therefore, KMC's ultimate parent
3 is KMC Telecom Holdings, Inc.

4 4. On March 29, 2002, the Commission's Utilities Division Staff ("Staff") filed its Staff
5 Report, which recommended approval of the application and included a number of additional
6 recommendations.

7 5. On May 7, 2002, a Procedural Order was issued setting this matter for hearing on July
8 17, 2002 and setting various procedural deadlines.

9 6. On July 17, 2002, a full public hearing in this matter was held as scheduled. Applicant
10 appeared telephonically and was represented by counsel. Staff appeared and was represented by
11 counsel. The hearing was conducted before a duly authorized Administrative Law Judge. Evidence
12 was presented and testimony was taken. At the conclusion of the hearing, the Administrative Law
13 Judge took the matter under advisement and informed the parties that a Recommended Opinion and
14 Order would be prepared for the Commissioners' consideration.

15 7. Applicant has the technical capability to provide the services that are proposed in its
16 application.

17 8. Currently there are several incumbent providers of local exchange and interexchange
18 services in the service territory requested by Applicant, and numerous other entities have been
19 authorized to provide competitive local and interexchange services in all or portions of that territory.

20 9. It is appropriate to classify all of Applicant's authorized services as competitive.

21 10. The Staff Report stated that Applicant has no market power and the reasonableness of
22 its rates would be evaluated in a market with numerous competitors.

23 11. According to Staff, KMC submitted the unaudited financial statement of its parent,
24 KMC Telecom Holdings, Inc. for the year ending December 31, 2000. These financial statements list
25 assets of \$1.3 billion, negative equity of \$284.3 million, and a net loss of \$454.1 million.

26 12. The Application states that KMC collects advances and deposits from its customers.

27 13. Staff recommends that KMC's application for a Certificate to provide competitive
28 facilities-based and resold local exchange and resold interexchange telecommunications services be

1 granted subject to the following conditions:

- 2 (a) that, unless it provides services solely through the use of its own facilities,
3 KMC be ordered to procure an Interconnection Agreement, within 365 days of
4 the effective date of the Order in this matter or 30 days prior to the provision of
5 service, whichever comes first, that must remain in effect until further order of
6 the Commission, before being allowed to offer local exchange service;
- 7 (b) that KMC be ordered to file with the Commission, within 365 days of the
8 effective date of the Order in this matter or 30 days prior to the provision of
9 service, whichever comes first, its plan to have its customers' telephone
10 numbers included in the incumbent's Directories and Directory Assistance
11 databases;
- 12 (c) that KMC be ordered to pursue permanent number portability arrangements
13 with other LECs pursuant to Commission rules, federal laws and federal rules;
- 14 (d) that KMC be ordered to abide by and participate in the AUSF mechanism
15 instituted in Decision No. 59623, dated April 24, 1996 (Docket No. RT-T-
16 03905A-00-0513E-95-0498);
- 17 (e) that KMC be ordered to abide by the quality of service standards that were
18 approved by the Commission for USWC in Docket No. T-0151B-93-0183;
- 19 (f) that in areas where it is the sole provider of local exchange service facilities,
20 KMC be ordered to provide customers with access to alternative providers of
21 service pursuant to the provisions of Commission rules, federal laws and
22 federal rules;
- 23 (g) that KMC be ordered to certify, through the 911 service provider in the area in
24 which it intends to provide service, that all issues associated with the provision
25 of 911 service have been resolved with the emergency service providers within
26 365 days of an Order in this matter or 30 days prior to the provision of service,
27 whichever comes first, which certification must remain in effect until further
28 Order of the Commission;
- 29 (h) that KMC be ordered to abide by all the Commission decisions and policies
30 regarding CLASS services;
- 31 (i) that KMC be ordered to provide 2-PIC equal access;
- 32 (j) that KMC be required to notify the Commission immediately upon changes to
33 its address or telephone number;
- 34 (k) that KMC be ordered to comply with all Commission rules, orders, and other
35 requirements relevant to the provision of intrastate telecommunications
36 service;
- 37 (l) that KMC be ordered to maintain its accounts and records as required by the
38 Commission;
- 39 (m) that KMC be ordered to file with the Commission all financial and other
40 reports that the Commission may require, and in a form and at such times as
41 the Commission may designate;

- 1 (n) that KMC be ordered to maintain on file with the Commission all current
2 tariffs and rates, and any service standards that the Commission may require;
3 (o) that KMC be ordered to cooperate with Commission investigations of
4 customer complaints; and
5 (p) KMC be ordered to participate in and contribute to a universal service fund, as
6 required by the Commission.

7 15. Staff further recommended that KMC's application for a CC&N to provide intrastate
8 telecommunications services should be granted subject to the following conditions:

- 9 (a) KMC be ordered to file conforming tariffs within 365 days from the date of an
10 Order in this matter or 30 days prior to providing service, whichever occurs
11 first, and in accordance with the Decision;
12 (b) In order to protect KMC's customers:
13 (1) KMC should be ordered to procure a performance bond equal to \$135,000.
14 The minimum bond amount of \$135,000 should be increased if at any time
15 it would be insufficient to cover prepayments or deposits collected from
16 KMC's customers. The bond amount should be increased in increments of
17 \$67,500 whenever the total amount of the advances, deposits and
18 prepayments is within \$13,500 of the bond amount;
19 (2) if KMC desires to discontinue service, it should be required to file an
20 application with the Commission pursuant to A.A.C. R14-2-1107;
21 (3) KMC should be required to notify each of its local exchange customers and
22 the Commission 60 days prior to filing an application to discontinue
23 service pursuant to A.A.C. R14-2-1107; and any failure to do so should
24 result in forfeiture of the Applicant's performance bond;
25 (4) KMC should docket proof of the performance bond within 365 days of the
26 effective date of an Order in this matter or 30 days prior to the provision of
27 service, whichever comes first, and must remain in effect until further
28 Order of the Commission;
29 (5) if, at some time in the future, KMC does not collect from its customers an
30 advance, deposit and/or prepayments, Staff recommends that KMC be
31 allowed to file a request for cancellation of the resold long distance portion
32 of its established performance bond. Such request should be filed with the
33 Commission for Staff review. Upon receipt of such filing and after Staff
34 review, Staff will forward its recommendation to the Commission; and
35 (c) If any of the above timeframes are not met, that KMC's CC&N should become
36 null and void without further Order of the Commission and no extensions for
37 compliance should be granted.

16. In its Staff Report, Staff stated that based on information obtained from the Applicant, it has determined that KMC's fair value rate base is zero¹, and is too small to be useful in setting rates. Staff further stated that in general, rates for competitive services are not set according to rate of return regulation, but are heavily influenced by the market. Staff recommended that the Commission not set rates for KMC based on the fair value of its rate base.

17. The rates to be ultimately charged by KMC will be heavily influenced by the market. Because of the nature of the competitive market and other factors, a fair value analysis is not necessarily representative of the company's operations.

18. Staff stated that KMC lacks the market power to adversely affect the telecommunications market by either restricting output or raising prices. Also, Staff has recommended that KMC's services be classified as competitive and thus subject to the flexible pricing authority allowed by the Commission's Competitive Telecommunications Services rules. Staff believes that these two factors, lack of market power and the competitive marketplace for the services KMC proposes to offer, support the conclusion that a fair value analysis is not necessarily representative of the company's operations, and that the rates charged by KMC will be reasonable.

19. Staff's recommendations, as set forth herein, are reasonable.

20. KMC's fair value rate base is determined to be zero for purposes of this proceeding.

CONCLUSIONS OF LAW

1. Applicant is a public service corporation within the meaning of Article XV of the Arizona Constitution and A.R.S. §§ 40-281 and 40-282.

2. The Commission has jurisdiction over Applicant and the subject matter of the application.

3. Notice of the application was given in accordance with the law.

4. A.R.S. § 40-282 allows a telecommunications company to file an application for a Certificate to provide competitive telecommunications services.

¹ At the hearing, Randy Meecham, a manager of State and Government Affairs for KMC, explained that currently the particular business unit of KMC that would conduct business pursuant to the Certificate, if granted, is not currently operational as KMC has experienced delays in product roll-out and due to capital constraints that the industry is experiencing.

5. Pursuant to Article XV of the Arizona Constitution, as well as the Arizona Revised Statutes, it is in the public interest for Applicant to provide the telecommunications services set forth in its application.

6. Applicant is a fit and proper entity to receive a Certificate authorizing it to provide competitive facilities-based and resold local exchange and resold interexchange telecommunications services in Arizona as conditioned by Staff's recommendations.

7. The telecommunications services that the Applicant intends to provide are competitive within Arizona.

8. Pursuant to Article XV of the Arizona Constitution as well as the Competitive Rules, it is just and reasonable and in the public interest for Applicant to establish rates and charges that are not less than the Applicant's total service long-run incremental costs of providing the competitive services approved herein.

9. Staff's recommendations, as set forth herein, are reasonable and should be adopted.

10. KMC's competitive rates, as set forth in its proposed tariffs, are just and reasonable and should be approved.

ORDER

IT IS THEREFORE ORDERED that the application of KMC Data, L.L.C. for a Certificate of Convenience and Necessity for authority to provide competitive facilities-based and resold local exchange, and resold interexchange telecommunications services in Arizona shall be, and is hereby, granted, conditioned upon KMC Data, L.L.C.'s timely compliance with the following three Ordering Paragraphs.

IT IS FURTHER ORDERED that KMC Data, L.L.C. shall file conforming tariffs in accordance with this Decision "within 365 days of this Decision or 30 days prior to providing service, whichever comes first.

IT IS FURTHER ORDERED that KMC Data, L.L.C. shall procure a performance bond equal to \$135,000 the earlier of 365 days from the effective date of this Order or 30 days prior to the commencement of service. The minimum bond amount of \$135,000 shall be increased if, at any time, it would be insufficient to cover prepayments or deposits collected from the Applicant's

customers. The bond amount shall be increased in increments of \$67,500. This increase shall occur when the total amount of the advances, deposits, and prepayments is within \$13,500 of the bond amount.

IT IS FURTHER ORDERED that KMC Data, L.L.C. shall comply with all of the Staff recommendations set forth in the above-stated Findings of Fact and Conclusions of Law.

IT IS FURTHER ORDERED that if KMC Data, L.L.C. fails to meet the timeframes outlined in the Ordering Paragraphs above, that the Certificate of Convenience and Necessity conditionally granted herein shall become null and void without further Order of the Commission.

IT IS FURTHER ORDERED that if KMC Data, L.L.C. fails to notify each of its customers and the Commission at least 60 days prior to filing an application to discontinue service pursuant to A.A.C. R14-2-1107, that in addition to voidance of its Certificate of Convenience and Necessity, KMC Data, L.L.C.'s performance bond shall be forfeited.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

CHAIRMAN

COMMISSIONER

COMMISSIONER

IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive Secretary of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this 23rd day of AUGUST, 2002.

BRIAN C. McNEIL
EXECUTIVE SECRETARY

DISSENT
PJD:mlj

1 SERVICE LIST FOR:

KMC DATA, L.L.C.

2 DOCKET NO.:

T-04014A-01-0340

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